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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHONGT YANG, Defendant and Appellant.	C056356 (Super. Ct. No. 05F03254)
THE PEOPLE, Plaintiff and Respondent, v. GE LOR PAO, Defendant and Appellant.	C056754 (Super. Ct. No. 05F03254)

As the victim was stopped in traffic at a red light, defendants Chongt Yang and Ge Lor Pao approached his car on foot and shot him to death. Convicted of first degree murder, Yang and Pao appeal. Yang contends that the trial court erred when it (1) gave the jury a charge while it was deadlocked, (2) denied Yang's motion for a new trial, or alternatively

to unseal juror information, based on jury misconduct, and (3) failed to order that victim restitution be paid jointly and severally. Pao contends that (1) the trial court erred when it refused to give an instruction on voluntary manslaughter, (2) the prosecutor committed misconduct, (3) the court improperly allowed admission of a statement by Pao's girlfriend that she had seen him in possession of a firearm, and (4) imposition of an additional indeterminate term for firearm use violated double jeopardy principles. Finding no prejudicial error, we affirm both judgments.

FACTS[1]

The defendants are members of the Yang Boyz or YBZ gang, a subset of the Hmong Nation Society or HNS gang. The victim, Pra Sert Yang (Pra), was a member of the Menace Boys Crew or MBC gang. MBC and HNS are rival gangs.

On February 20, 2005, Pra was driving his red Honda in Sacramento, and the defendants, along with Bou Vang (Pao's girlfriend) and Cheng Xiong Vang, were riding in a gold Toyota, also in Sacramento. Eventually, both cars were headed eastbound on Florin Road, near Stockton Boulevard, at the same time.

The red Honda stopped on Florin Road, at the intersection with Stockton Boulevard, in the left turn lane. The gold Toyota pulled to the right lane.

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[1] "In setting forth this evidence, we apply the familiar appellate standard that, '[o]n appeal, we . . . construe the facts in the light most favorable to the judgment.' [Citation.]" (*People v. Curl* (2009) 46 Cal.3d 339, 342, fn. 3.)

The defendants exited the gold Toyota in traffic -- Pao from the front passenger seat and Yang from the rear passenger seat. Each had a gun.

The defendants approached the red Honda. Each of the defendants shot multiple times at Pra, who was inside the Honda. He was hit six times and killed.

After the defendants returned to the gold Toyota, it went through the parking lot of a business on the corner and then onto southbound Stockton Boulevard.

PROCEDURE

The district attorney charged the defendants by information with murder (Pen. Code, § 187, subd. (a)), and alleged that the murder was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and that a principal in the offense used a firearm (Pen. Code, § 12022.53).

The defendants were tried together, but with separate juries. Yang's jury convicted him of first degree murder and found true the allegation that he committed the crime for the benefit of a criminal street gang. The jury found not true the firearm use allegation. Pao's jury convicted him of first degree murder and found true both allegations -- that he committed the crime for the benefit of a criminal street gang and that a principal personally used a firearm, including personally discharging a firearm and causing death. (Pen. Code, § 12022.53, subd. (d)(1).)

The trial court sentenced Yang to state prison for an indeterminate term of 25 years to life and ordered Yang to pay

$21,305.89 in victim restitution. Pursuant to *People v. Lopez* (2005) 34 Cal.4th 1002, the court did not impose a separate term for the gang enhancement.

The trial court sentenced Pao to state prison for an indeterminate term of 25 years to life for first degree murder and a consecutive 25 years to life for the firearm enhancement. As with the Yang sentencing, the trial court did not impose punishment for the gang enhancement.

DISCUSSION[2]

I

Allen *Charge (Yang)*

Yang contends that the trial court gave the jury an improper *Allen* charge when the jury reported that it was deadlocked. (*Allen v. United States* (1896) 164 U.S. 492 [41 L.Ed. 528] (*Allen*) ; *People v. Gainer* (1977) 19 Cal.3d 835 (*Gainer*).) We conclude that the trial court did not commit error in the manner in which it instructed the jury after the jury reported that it was deadlocked.

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[2] Yang joins in all arguments made by Pao that may be beneficial to Yang. (Cal. Rules of Court, rule 8.200(a)(5).)

A. *The Instruction*

During deliberations, Yang's jury submitted a written question to the trial court. It stated: "What is the procedure that would be taken when 1 or more jurors are unable to make up their mind/decision one way or the other?"

The trial court prepared a proposed answer and allowed the prosecutor and counsel for Yang to review it. Counsel for Yang objected to the first paragraph, which was an introduction stating that it was the court's experience that a jury having difficulty may ultimately succeed in rendering a verdict. The court struck that paragraph, and it gave the remainder of the instruction to the jury, in written form. The court gave the following instruction, with italics added to highlight the portion of the instruction with which Yang now finds fault:

"Your goal as jurors should be to reach a fair and impartial verdict if you are able to do so, based solely on the evidence, without regard to emotional considerations or the consequences of the verdict, regardless of how long it takes.

"Your duty is to carefully consider, weigh and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors. *In the course of further deliberations, you should not hesitate to re-examine your own views or to request your fellow jurors to re-examine theirs. It should be possible to inquire of jurors in the numerical minority as to the reasons upon which their opinions were based. This should*

be done in a respectful and dignified manner. Likewise, jurors in the numerical majority may also be required to explain their own opinions. You should not hesitate to change a view you once held if you are convinced it is wrong, or to suggest that other jurors change their views if you are convinced they are wrong. Fair and effective deliberations require a frank and forthright exchange of views.

"As I previously instructed, both the People and the defendant are entitled to the individual judgment of each juror. Each of you must decide the case for yourself. But your decision should be made only after full and complete consideration of all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge and enhancements if you can do so without violence to your individual judgment.

"You have absolute discretion to conduct deliberations in any way you deem appropriate. However, since you have expressed that you are having difficulty in arriving at a verdict using methods you have chosen so far, may I suggest that you consider changing your methods, at least temporarily, and try new methods. For example, you may wish to consider having different jurors lead the discussion for a period of time, or you may wish to experiment with reverse role playing by having those on one side of an issue present and argue the other side's position. This might enable you to better understand the other's positions.

"By suggesting changes in your method of deliberations, I want to stress I am not dictating or instructing you as to how to conduct your deliberations. I am just saying that you may find it productive to do whatever is necessary to ensure each juror has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors.

"I hope my comments and suggestions are of some assistance to you." (Emphasis added.)

The Yang jury eventually reached a verdict on the charge and the alleged enhancements. Notably, the jury found the firearm use enhancement untrue.

B. *Analysis*

The instruction given to the jurors when they reported that they were deadlocked is almost identical to an instruction that we found was proper in *People v. Moore* (2002) 96 Cal.App.4th 1105 (*Moore*). The main difference between the *Moore* instruction and the instruction given here was the reference to the minority and majority positions, italicized above.

As we explained in *Moore, supra,* 96 Cal.App.4th at pages 1120 to 1121: "In *Allen v. United States*[, *supra*,] 164 U.S. 492, 501-502, the Supreme Court approved a charge (the *Allen* charge) which encouraged the minority jurors to reexamine their views in light of the views expressed by the majority, noting that a jury should consider that the case must at some time be decided. In *People v. Gainer*[, *supra*,] 19 Cal.3d 835, however, our state high court disapproved of *Allen* in two respects. The *Gainer* court found 'the discriminatory admonition directed to

minority jurors to rethink their position in light of the majority's views' was improper, inasmuch as, by counseling minority jurors to consider the majority view, whatever it might be, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict. (*Gainer,* at pp. 845, 848.)"

Yang contends that the instruction given to the jurors after they had reported that they were deadlocked was erroneous for four reasons: (1) reference to the numerical division in the jury diminished the jurors' decisionmaking role; (2) the court did not encourage the jury to review the instructions already given concerning their deliberations; (3) the instruction is not one of the "approved" jury instructions; and (4) cases have recently criticized *Moore*.

1. Reference to Numerical Division

Yang contends that the reference to the numerical division in the jury "coerced jurors into abdicating their individual judgment and responsibility to weigh and consider the evidence, diminishing the individual decision making role of each juror." We disagree. Although the court mentioned the numerical division of the jury, it did so even-handedly, exhorting the minority to consider the arguments of the majority and the majority to consider the arguments of the minority.

In *Gainer*, the Supreme Court disapproved an instruction worded as follows: "'[I]f much the larger of your panel are for a conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, which makes no

impression upon the minds of so many men or women equally honest, equally intelligent with himself or herself, and [who] have heard the same evidence with the same attention and with an equal desire to arrive at the truth and under the sanction of the same oath. [¶] And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.'" (*Gainer, supra,* 19 Cal.3d at p. 841.)

The instruction given here bears little resemblance to the instruction disapproved in *Gainer*. Here, instead of urging the minority jurors to consider whether their own views are reasonable and soundly founded, the court encouraged all jurors, whether in the majority or minority, to reexamine their views, and to explain their views and opinions. This is not the same as the instruction in *Gainer*. The only resemblance here to *Gainer* is the mere mention of the numerical division of the jury. That mention, alone, did not bring the instruction into the ambit of *Gainer* and thus did not render it improper.

In support of his contention, Yang cites *People v. Hinton* (2004) 121 Cal.App.4th 655, at page 662, which stated: "'The most questionable feature of the [*Allen*] instruction is the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views.' [Citation.]"

The Court of Appeal stated: "[T]he judge instructed jurors holding a minority position to question that position in light of the majority's view. The judge stated that the jurors should 'respect the majority opinion' and should 'listen with proper deference to each other and should question their own judgment if a majority of the jurors take a different view of the case.' That the judge also emphasized each juror must still reach his or her own decision did not repair the damage done by the instruction. Like the instruction in *Gainer*, it directed 'the jurors to include an extraneous factor in their deliberations, i.e., the position of the majority of jurors at the moment.' (*Gainer, supra*, 19 Cal.3d at p. 848.)" (*People v. Hinton, supra,* 121 Cal.App.4th at pp. 659-660.)

We are unpersuaded that *Hinton* requires reversal here. As did the instruction in *Gainer*, the instruction in *Hinton* implied that the views of the minority jurors were wrong. No such implication appeared in the instruction given in this case. We therefore conclude that Yang's contention is without merit.

2. Lack of Encouragement to Read Other Instructions

In *Moore*, the trial court, in addition to giving the instruction similar to the one given here, encouraged the jurors to reread the instructions originally given concerning their deliberations. (*Moore, supra,* 96 Cal.App.4th at p. 1119.) In this case, the court did not similarly encourage the jurors to reread the original instructions concerning deliberations. Yang asserts that this difference is significant because a review of

the original instructions would have reminded the jurors of the importance of their individual judgments.

In our view, this difference is insignificant. The jurors were properly instructed. There was no duty also to admonish the jurors to reread the instructions.

3. Instruction, As Given, Not "Approved"

Yang asserts that "the portions of the instruction approved in *Moore* and given here are *not* approved as one [of] the state's official instructions." (Original emphasis.) Noting that the instruction has not been adopted as a standard instruction, Yang concludes that "[t]he decision not to include the instruction must be construed as implied criticism of the instruction."

Yang cites no authority for the proposition that it is error to give an instruction that has not been adopted as a standard instruction. We know of none. Our task is to determine whether giving the instruction was error. Since we determine that it was not, we see no relevance in whether it has been included in the standard set.

4. Criticism of Instruction

Finally, Yang asserts that one justice, writing a concurring opinion, criticized the *Moore* instruction in *People v. Whaley* (2007) 152 Cal.App.4th 968, 985 (conc. opn. of McAdams, J.). As we did with the previous argument, we find this argument unconvincing. We note that the view of the justice in question did not garner another vote. Accordingly, we see no need to discuss the concurring opinion in that case.

II

Motion for a New Trial (Yang)

After trial, Yang made a motion for a new trial based on juror misconduct. He claimed that the foreman of the jury committed misconduct by refusing another juror's request to get clarification from the court on the aiding and abetting instructions. The court took testimony from the juror and then denied the motion for a new trial. The court then proceeded, immediately, to judgment and sentencing. Yang contends that the trial court erred by (A) denying the motion for a new trial. He also contends that the trial court erred by (B) denying his request to unseal juror information and (C) denying his request for a continuance to pursue the juror misconduct matter. These contentions are without merit.

A. *Motion for a new trial*

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal.4th 463, 524.) "When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.)

When a defendant seeks a new trial based on jury misconduct, the trial court must first determine whether the

evidence presented for its consideration is admissible, then consider whether the facts establish misconduct. If misconduct is found, the court must determine whether the misconduct was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) We review the trial court's determination on a motion for a new trial for abuse of discretion. (*Id.* at p. 113.)

Here, Yang asserted in his motion for a new trial that Juror No. 4 had been subjected to harassment. Interview notes attached to the motion for a new trial stated that Juror No. 4 believed he had made an error and that he was harassed into voting guilty. These notes were not in the form of a declaration.

Juror No. 4 testified during the hearing on the motion for a new trial. He was questioned by the court. During his testimony, he made six allegations of misconduct. They were: (1) at some point during the deliberations, the foreman cut off deliberations by saying that they would vote in 15 minutes; (2) Juror No. 4 asked the foreman to ask the court to clarify the aiding and abetting instructions but the foreman denied the request; (3) the foreman would not let Juror No. 4 prepare a presentation at home and then present it to the rest of the jury; (4) one of the other jurors announced on the second day of deliberations that she was going to vote guilty "no matter what"; (5) one of the jurors turned her chair away from Juror No. 4's presentation and he believed that meant that she was not willing to consider his presentation; and (6) when Juror No. 4 was reviewing phone records, another juror said, "What are you

looking at the phone records for, either he is guilty or not guilty?"

Although Juror No. 4 made multiple misconduct claims, counsel for Yang argued only that the foreman's denial of Juror No. 4's request to get clarifying instructions on aiding and abetting was juror misconduct and required the court to grant a new trial. The trial court found no misconduct, stating that the court gave the clarifying instructions concerning aiding and abetting. The court stated: "[I]t appears the foreman did exactly what [Juror No. 4] asked him to."

In response to this statement, counsel for Yang stated that he believed that Juror No. 4 wanted further clarification, specifically with respect to the difference between aiding and abetting before and after the crime. The court disagreed, noting that Juror No. 4 did not say that his difficulty was with that distinction or the definition of an accessory.

On appeal, Yang asserts that the foreman's refusal to obtain further instructions concerning aiding and abetting, as requested by Juror No. 4, constituted juror misconduct. The record does not support this assertion.

The testimony of Juror No. 4 was ambiguous concerning when he asked for clarification concerning the aiding and abetting instructions. He said that he asked the foreman to get clarification from the court concerning "certain points within the, um, charges and the jurors[']s instructions." This occurred "on the last day of deliberations and at least on one occasion prior to that." When the court asked what those points

were, Juror No. 4 replied that one had to do with clarifying the aiding and abetting instructions and the other was whether he could prepare a presentation at home.

From this exchange, it is unclear whether Juror No. 4 wanted clarification concerning the aiding and abetting instructions on the last day of deliberations or some time before that. This is significant because, as Yang notes on appeal, the court gave clarifying instructions concerning aiding and abetting in response to a jury question, but that did not occur on the last day of deliberations. The court gave the additional instructions on aiding and abetting on May 29, 2007, and the jury finished its deliberations and rendered its verdict on May 31, 2007.

In denying the motion for a new trial, the trial court interpreted Juror No. 4's statement concerning clarifying the aiding and abetting instructions to be contemporaneous with the jury's request to the court in that regard. That interpretation is supported by the ambiguous record. Therefore, we must accept that interpretation because we uphold a trial court's factual determinations on appeal if they are supported by substantial evidence. (*People v. Tafoya* (2007) 42 Cal.4th 147, 194.)

Yang, however, attempts to rely on the statements in the interview notes to contradict the findings of the trial court at the hearing on the motion for a new trial. As noted, the interview was not in the form of a declaration and, therefore, had no value as evidence.

The record supports the trial court's finding that Juror No. 4's complaint about the foreman's refusal to obtain further aiding and abetting instructions was unfounded. Therefore, the trial court did not abuse its discretion in denying the motion for a new trial by finding that there was no misconduct.

B. *Request to Unseal Juror Information*

During the hearing on the motion for a new trial, counsel for Yang stated that Juror No. 4 had given him four names of jurors who would be able to corroborate the testimony of Juror No. 4 concerning the deliberations, although counsel candidly admitted that Juror No. 4 was "somewhat vague in exactly what they could corroborate." After Juror No. 4 testified, counsel for Yang requested the court to allow him "to file a motion to unseal juror records" so that he could contact other jurors and attempt to corroborate Juror No. 4's allegations of misconduct. After further argument, the court denied the motion for a new trial and "the request for a further inquiry into the jurors[']deliberations by unsealing the juror information."

On appeal, Yang contends that, even if the evidence presented in support of the motion for a new trial was not sufficient to find that the trial court abused its discretion in denying the motion for a new trial, the evidence was sufficient to require the trial court to grant Yang's oral motion to unseal juror information. The contention is without merit.

"Pursuant to [Code of Civil Procedure] Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court

for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237." (Code Civ. Proc., § 206, subd. (g).)

Code of Civil Procedure section 237, subdivision (b) provides: "Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information . . . ."

A request for disclosure of personal juror identifying information must be "accompanied by a sufficient showing to support a reasonable belief jury misconduct occurred, diligent efforts were made to contact the jurors through other means, and that further investigation was necessary to provide the court with adequate information to rule on a motion for new trial." *(People v. Wilson* (1996) 43 Cal.App.4th 839, 850; see also *People v. Rhodes* (1989) 212 Cal.App.3d 541, 551-552.) "Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing

public interest served by disclosure of the juror information as a matter of right in each case. This rule safeguards both juror privacy and the integrity of our jury process against unwarranted 'fishing expeditions' by parties hoping to uncover information to invalidate the jury's verdict. At the same time, it protects a defendant's right to a verdict uninfluenced by prejudicial juror misconduct by permitting, upon a showing of good cause, access to juror information needed to investigate allegations of juror misconduct." *(People v. Rhodes, supra,* at p. 552, fn. omitted.) "A failure to make this required showing justifie[s] denying the request for disclosure." *(People v. Wilson, supra,* at p. 850.)

The burden of establishing good cause lies with the movant, in this case defendant *(People v. Granish* (1996) 41 Cal.App.4th 1117, 1131), and we review the trial court's ruling for an abuse of discretion *(People v. Jones* (1998) 17 Cal.4th 279, 317).

Yang did not make a motion to unseal juror information. Instead, he requested the opportunity to file a motion to unseal. Therefore, he cannot complain on appeal that the trial court denied his motion to unseal juror information.

In any event, even if we consider the oral motion to be a written petition to unseal juror information, it was insufficient to establish a prima facie case to support a reasonable belief jury misconduct occurred. As noted, the testimony of Juror No. 4 did not establish that misconduct had occurred. In addition, Yang did not file "a declaration that includes facts sufficient to establish good cause for the

release of the juror's personal identifying information." (Code Civ. Proc., § 237, subd. (b).) Because Yang did not make a satisfactory preliminary showing that misconduct occurred, the trial court did not abuse its discretion in denying the motion to unseal juror information, even if his oral motion is interpreted as a written petition.

C. *Motion for a Continuance*

In connection with his motion for a new trial, Yang filed a written motion for a continuance. In it, his trial counsel declared that a continuance was "necessary to bring [a] motion to unseal jury records." The trial court did not expressly rule on the motion for a continuance.

Yang contends that the trial court abused its discretion by denying the motion for a continuance "because it deprived [Yang] of a reasonable opportunity to obtain juror information which might have resulted in a new trial." The Attorney General responds that, because Yang did not obtain a ruling on this motion, he cannot contend on appeal that the trial court abused its discretion in denying it. We agree with the Attorney General.

Where the court, through inadvertence or neglect, neither rules nor reserves its ruling, the party who is seeking the ruling must make some effort to have the court actually rule. (*People v. Braxton* (2004) 34 Cal.4th 798, 813-814.) The party's failure to do so may be considered a forfeiture of the issue. (*Ibid.; In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) That is the case here. The trial court did not rule expressly on the

motion for a continuance, and Yang did not point out this oversight to the court.

In any event, the court did not abuse its discretion even if we were to find that the trial court implicitly denied the motion for a continuance. Yang was unsuccessful in establishing that a continuance would have resulted in the gathering of evidence of jury misconduct. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1105 [not abuse of discretion to deny continuance if defendant fails to carry burden that it would benefit defendant].)

III

Victim Restitution (Yang)

Yang contends that the judgment should be modified to reflect joint and several liability along with Pao and others for victim restitution. The Attorney General does not oppose the request to modify. Nonetheless, finding no error, we decline to modify the judgment.

At sentencing, the prosecutor argued that the trial court should impose victim restitution in the amount of $21,305.89 for funeral and burial expenses. Yang's counsel responded: "I have no problem with that as long as it's joint and several liability with all four Defendants." The court commented: "I think that what will happen is that each Defendant will obviously receive that restitution amount. They [referring to the victim's family] are only going to receive it once, which is the law." The court ordered Yang to "pay restitution to the family of the victim in the amount of $21,305.89." The abstract of judgment

reflected the victim restitution amount, but did not state whether it is to be joint and several.

We have no record of whether Bou Vang and Cheng Xiong Vang, who were in the car when Yang and Pao killed Pra, were convicted and ordered to pay victim restitution. As to Pao, the trial court imposed victim restitution in an amount to be determined later.

There is nothing in the restitution statute suggesting that a joint and several restitution order is required. Yang cites *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535-1536, for the proposition that "[w]here a trial court has ordered several defendants to pay victim restitution in the same amount, an appellate court may find that the order is meant to be one for joint and several liability for paying one total amount of direct victim restitution and may modify the lower court's order to reflect joint and several liability."

Yang's contention that we must modify the judgment is without merit for two reasons: (1) we do not know whether and how much others will be ordered to pay in victim restitution resulting from Yang's crime and (2) that we *may* modify the judgment (*People v. Blackburn, supra,* 72 Cal.App.4th 1520 at pp. 1535-1536) does not require such modification, especially when there is insufficient information concerning the restitution orders imposed on other defendants. Finding no error in the judgment, we decline Yang's invitation to modify it.

IV

Jury Instruction on Voluntary Manslaughter (Pao)

Pao contends that the trial court erred by not instructing the jury concerning voluntary manslaughter as a lesser included offense of murder. He claims there was sufficient evidence of provocation to require this instruction. We disagree. Evidence of provocation, if any, was insubstantial and did not warrant a voluntary manslaughter instruction.

When a defendant is charged with murder, the trial court's duty to instruct sua sponte on the lesser included offense of voluntary manslaughter arises whenever there is substantial evidence that a jury could reasonably conclude that the defendant killed the victim in a sudden quarrel or heat of passion. (*People v. Breverman* (1998) 19 Cal.4th 142, 153-164 (*Breverman*); *People v. Barton* (1995) 12 Cal.4th 186, 200-201 (*Barton*).) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*Barton, supra,* at p. 201.) "Moreover, the passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion'"' [citation] other than revenge [citation]. 'However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and

reason to return, the killing is not voluntary manslaughter . . . .' [Citation.]" (*Breverman, supra,* at p. 163.)

"[T]he trial court need not instruct on a lesser included offense whenever *any* evidence, no matter how weak, is presented to support an instruction, but only when the evidence is substantial enough to merit consideration by the jury." (*Barton, supra,* 12 Cal.4th at p. 195, fn. 4, original emphasis.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*Id.* at p. 201, fn. 8.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*Breverman, supra,* at p. 162.) "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense."[3] (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

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[3] The Attorney General contends that, even though Pao requested an instruction on voluntary manslaughter, Pao forfeited the contention for appellate purposes because he did not obtain a ruling on the request. We disagree that the contention was forfeited. The trial court had a duty to instruct sua sponte on "all theories of a lesser included offense which find substantial support in the evidence." (*Breverman, supra,* 19 Cal.4th at p. 162.) In light of this conclusion that the issue is not forfeited, we need not consider Pao's contention that his trial counsel was ineffective for failing to obtain a ruling on the request for a voluntary manslaughter instruction.

Pao bases his argument that the trial court should have given a voluntary manslaughter instruction on evidence of two incidents: (1) Pra's confrontation with Pao's cousin, Lue Yang and (2) shots fired at Pao's residence from an apartment that Pra later occupied.

The first incident involved Lue Yang, who is Pao's cousin. Lue lived with Pao's family in Marysville when Lue and Pao were children. They also lived together for some period of time after they each moved to Sacramento.

In June 2004, eight months before Pra's killing, Lue visited Pao's home and then left to meet his brothers to go fishing. Pra, in the red Honda, pulled up in back of Lue, while a truck pulled up along Lue's passenger side, thus cornering Lue. A Hmong person in the truck pointed a gun at Lue. After this confrontation, Lue drove home and picked up a friend, Her Kue, who was armed. They again encountered Pra in the red Honda. Someone in the Honda pointed something at Lue and Her, so Her rolled down the window and shot at the red Honda.

Lue told Pao about the June 2004 incident with Pra.

The second incident involved the firing of shots at Pao's residence from an apartment nearby. On two successive nights in August 2004, six months before Pra's killing, shots were fired at the house in which Pao lived with his family. The shots were fired from the direction of an apartment in which Pra lived at the time he was murdered. Citing this evidence, Pao states: "It is thus reasonable to infer that when [Pao] encountered Pra on February 20th in Sacramento, he had learned that Pra, the

same person who had twice attempted to assault [Pao's] cousin after the cousin had stopped at [Pao's], lived in the apartment in front of which shots had been fired at the home of [Pao] and his family. At the same time, it cannot be said with any certainty that [Pao] knew that Pra had in fact moved into that apartment only after August 2004."

A conviction of voluntary manslaughter based on heat of passion requires proof beyond a reasonable doubt of an objective test of "sufficient provocation," that is "'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment"'" (*Breverman, supra,* 19 Cal.4th at p. 163) and a subjective test of provocation, that is, whether the defendant's reason was *actually* overcome by overwhelming passion at the time of the homicide. (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411.)

The record here fails to demonstrate that Pao acted with objective provocation -- that is, whether the provocation was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. Viewing the incidents cited by Pao individually or collectively, any provocation was very stale and attenuated, and thus insufficient to warrant an instruction on voluntary manslaughter.

Pra's confrontation with Lue took place eight months before Pao killed Pra. In addition to the passage of time, there is no evidence that Pra or his cohorts fired at Lue. An ordinary person of average disposition would not have been provoked to

kill Pra because there had been a confrontation of this type then so remote, a confrontation that did not involve Pao.

As to the second incident, the evidence concerning Pra later living in the apartment from which shots had been fired at Pao's home is speculative. There is no evidence that Pao knew where Pra lived or that he associated Pra with the apartment in question. Without such knowledge, there would be no possibility of provocation.

Pao argues, however, that, even though the evidence concerning provocation was remote in time, seeing Pra "re-ignited" Pao's "smoldering passion" and "he became so inflamed with anger and fear that he jumped out of the Camry and shot Pra while in the heat of passion." For this proposition, Pao cites *People v. Bridgehouse* (1956) 47 Cal.2d 406 (overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89). In that case, the defendant shot and killed his wife's paramour. The wife had told the defendant that she was having an affair and refused to end it. When the defendant encountered the paramour unexpectedly, he was overcome by emotion and shot and killed the paramour. The California Supreme Court, reviewing the defendant's conviction for second degree murder, concluded that the evidence was insufficient to sustain a second degree murder conviction because of the undisputed evidence of the defendant's emotional and mental state at the time of the shooting. At most, the defendant was guilty of voluntary manslaughter. (*People v. Bridgehouse*, *supra*, at pp. 413-414.)

Pao asserts: "There was substantial evidence to support the inferences that [Pao's] being stopped at this same intersection at the same time was, like the *Bridgehouse* defendant's walking into his mother-in-law's home and seeing his wife's paramour, an unexpected encounter." He additionally asserts that his actions -- getting out of his car in traffic and shooting Pra in broad daylight -- support a conclusion that he acted in the heat of passion.

The assertion that this case is similar to *Bridgehouse* is without merit. In that case, there was ample, undisputed evidence that the defendant was distraught and visibly shaken by his unexpected encounter with his wife's paramour, whom the defendant's wife refused to leave. Here, there is no such evidence that Pao's prior experiences (or those of Pao's family) with Pra affected Pao in such a way as to negate malice. Furthermore, the fact that the crime was shockingly brazen does not show provocation at all, much less provocation sufficient to justify a voluntary manslaughter instruction.

The evidence was insufficient to support a conclusion that Pao's killing of Pra was a result of provocation. Therefore, the trial court correctly did not instruct on voluntary manslaughter.

V

Alleged Prosecutorial Misconduct (Pao)

Pao cites five instances of what he alleges constituted prosecutorial misconduct during the closing argument and rebuttal. He claims the prosecutor (1) lied about the defense's

trial options, (2) stated that Pao had a burden to prove his innocence, (3) denigrated defense counsel, (4) vouched for the strength of the prosecution's case, and (5) acted as an unsworn witness. Recognizing that he did not object to the alleged misconduct, Pao asserts that, to the extent an objection was needed, his trial counsel was ineffective for failing to object. We conclude that, with one exception, Pao forfeited his claims of prosecutorial misconduct. We further conclude that Pao's trial counsel did not provide ineffective assistance of counsel because the prosecutor's statements during closing argument and rebuttal did not constitute misconduct.

A. *Forfeiture and Asserted Effective Assistance of Counsel*

The Attorney General asserts that, with one exception, the contentions of prosecutorial misconduct were forfeited because Pao did not object to the prosecutor's comments when they were made.[4] Pao responds that it was unnecessary to object and obtain an admonition to the jury because that would not have cured the harm.

The California Supreme Court's analysis of the forfeiture issue in *People v. Wharton* (1991) 53 Cal.3d 522, at pages 566 and 567, is instructive:

"Defendant is precluded from raising this issue on appeal . . . because he failed to timely object and request the jury be

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[4] The one exception is noted below.

admonished. [Citations.] Because none of the comments was so serious that a timely admonition would have been inadequate to cure the harm, any objection to the prosecutor's argument is deemed waived. [Citations.] [¶] Defendant concedes trial counsel failed to object but presents two reasons why that fact is not controlling. . . . [¶] . . . [D]efendant would overcome application of the waiver rule by claiming his trial attorney provided ineffective assistance of counsel by failing to object. [Citations.] Keeping in mind that 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence' [citation], we examine each instance of alleged misconduct."

We similarly examine each instance of alleged misconduct, all of which occurred during the prosecution's closing argument or rebuttal argument.

B. *Law Concerning Prosecutorial Misconduct*

Improper remarks by a prosecutor can "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 157].) "'But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

C. *Alleged Instances of Prosecutorial Misconduct*

1. Comment about the Defense's Trial Options

Discussing the difference between trial counsel, who is an advocate, and the jury, which is the impartial judge, the prosecutor stated: "I can guarantee you, just as bold as this murder case was, just as red handed as this Defendant got caught, [Pao's defense counsel] will not get up here and say, My client did it. That is not forthcoming."

Commenting on Pao's defense strategy, the prosecutor stated: "But the defenses available in this case are very limited because there is no way anybody can argue this isn't a cold and calculated first degree murder, could they? There is no way. Not the way this thing went down. . . . [¶] The defenses available were very limited. He could only say it wasn't me. All right. And he needed one thing to pull that off, you need Lue Yang not to show up in this courtroom. That was the only way you were going to get there. Okay. So all of the eggs got put in that basket."[5]

Much later in the argument, the prosecutor returned to the subject of the defense strategy: "You will probably never in your lifetime see another murder like you did here, and I hope to never see one again too. This is as cold and calculated as

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[5] Lue Yang, who is Pao's cousin and Yang's nephew, testified that Pao and Yang told him that they shot Pra. In a recorded phone call from jail, Pao asked the person he called to contact Lue Yang and tell him not to come to court to testify.

it gets. That is why the Defense from day one was stuck with only one option, it wasn't me."

Quoting these comments from the prosecutor's closing argument, Pao contends that the prosecutor lied to the jury about the options for the defense because the prosecutor knew that Pao had a provocation defense. As we noted previously, however, the evidence was insufficient to support such a defense. Therefore, the prosecutor's statement that Pao had no defense beyond his identity defense was not a lie.

2. Comment Concerning Pao's Burden to Prove Innocence

At the beginning of his rebuttal argument, the prosecutor stated: "I think we need to be brutally honest about one thing, [Pao's defense counsel's] argument, while very eloquent, left us with this: They can't prove it. Right? That is the point of his argument, isn't it? He didn't say, my guy wasn't in that car. He didn't say, my guy was anywhere. He said, they can't prove it. [¶] When I started my closing argument I told you that these three [*sic*] Defendants made a concerted effort to make it as hard as they could for us to figure this out, didn't they? And [Pao's defense counsel] got up here and said, you can't figure it out. That is his point, isn't it? We can figure it out."

Later during his rebuttal argument, the prosecutor stated: "Counsel did exactly what I thought he would do, he isolated every piece of evidence and analyzed it as though it existed in a vacuum, by itself, didn't he? He didn't ask the one question

that matters most, what are the chances that the man with the biggest motive in the world, who confessed to his uncle, and then called on the phone and tried to dissuade him from showing up, was urging to get to his family to take two years in prison not to be here, that's something you just can't overcome."

Pao contends that these statements may have been understood by the jury as requiring Pao to prove his innocence. (*People v. Woods* (2006) 146 Cal.App.4th 106, 112 [improper for prosecutor to tell jury that defendant has burden to prove innocence].) We disagree.

In the first comment, the prosecutor was simply disagreeing with defense counsel's argument that the prosecution could not prove its case. It was proper argument to note that the defense had not attempted to establish that Pao was not in the gold Toyota. That was merely a comment on the state of the evidence and on defense counsel's argument.

In the second comment, the prosecutor properly argued that, despite the defense's attempt to have the jury view the evidence in isolation, viewing the evidence together established Pao's guilt. The statement about defense counsel not asking "the one question that matters most" was not an assertion that the defense was required to prove innocence; instead, it was a statement that the defense was attempting to have the jury not consider that question.

3. Denigrating Defense Counsel

Pao contends that the prosecutor improperly denigrated the defense and his counsel. He claims that comments made by the

prosecutor during closing argument impugned counsel for wasting the jury's time and trying to deceive the jury and keep critical evidence from being introduced. We conclude that the prosecutor did not commit misconduct.

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." *(People v. Hill* (1998) 17 Cal.4th 800, 832.) "It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom. [Citations.] [¶] Nevertheless, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. [Citations.]" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) "Although the prosecution may not attack defense counsel's integrity, it may . . . vigorously attack the defense case and argument if that attack is based on the evidence." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47.) Similarly, "remarks [that] simply point[] out that attorneys are schooled in the art of persuasion . . . [do] not improperly imply that defense

counsel [is] lying." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1216, fn. omitted.)

Pao asserts that 11 of the prosecutor's statements improperly impugned the defense and his counsel. We quote those statements, though out of context, with the parts that Pao finds objectionable in italics:

- "*And in the effort to make our jobs a thousand times harder, with phone records and ATM receipts*, we can get through it."[6]
- "I want to talk about Lue Yang, all right. Because *there was a very bold plan in this courtroom* to attack Bou Vang, to attack Bou Vang with lies that, well, that speak for themselves. That ATM receipt. No matters [*sic*] what I say about that, I honestly think that you folks figured that out before I did, right? [¶] If you think about it, they watched him at an ATM, right? They did that. But in order to make this plan work of the *surprise dramatic moment when the ATM receipt*, as [Pao's defense counsel] said, was unsealed on Wednesday and put it all on the record, I want you to remember that moment, because *the only way that works is if Lue Yang doesn't show*."

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[6] The phone records and the ATM receipts showed that Pra made a deposit and a withdrawal from an ATM close to where he was killed just minutes before he was killed. This evidence countered the testimony of Bou Vang that the gold Toyota had followed Pra in his red Honda on Highway 99 and Florin Road.

- "In the Hmong culture that means a lot, and I will prove that really quickly with Lue Yang. Get a hold of his relatives, tell him he can sit in jail for two years, it will go by in no time, because if Lue Yang shows up *the plan to attack Bou* is over, right? It won't work. Because Lue Yang knows who did the murder, okay."
- "And now I want to talk about Bou Vang. *This whole trial was set up with that concept Lue wouldn't show up* and Bou would be the only witness, right?"
- "Before they even *whipped out their magical dramatic event of the* [*phone and ATM*] *records* I stood in the back of this courtroom and said, Are you trying to tell us you didn't know your boyfriend had a gun? Right."
- "So we are thinking to ourselves, as [Yang's defense counsel] is mocking Bou Vang, right, were they talking to each other in the back seat *and the whole show that we had*."
- "With two days of phone records what did it appear? It appeared as though these two people weren't in the car together, right? With a full two months of phone records and her denial on the stand, we know Cheng didn't have the phone, Eva did. Okay. *Their plan to*

slaughter Bou Vang, who would know that -- first off, who would know that this is even simpler?"[7]

- "From subpoenaing two days of phone records, oh, it looks really weird, right? When you subpoena the whole packet and look at the whole thing in context, it's not weird at all, it's Eva's phone. See, it takes brain grease to get there and we can get there. All right. *Kind of like those ATM records, right*?"
- "*At the bank when that testimony came out* everybody knew what it meant. I didn't even have to say anything, did I? In context *it wasn't about investigating a* case or --. [¶] [Defense objection overruled.] [¶] . . . *It wasn't about investigating a case. It was much like [Yang's defense counsel's] two days of cell phone records, wasn't it*? Think about it. *It was done for presentation of evidence at trial, not about finding out what happened*. You think that through. *I don't even know if Counsel would comment on it in his closing*. I know that [Yang's defense counsel] didn't want anything to do with it.

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[7] The phone records referred to in this paragraph are of a cell phone owned by Cheng, who was an occupant of the gold Toyota. The records showed calls between Cheng's cell phone and Yang's cell phone, possibly contradicting testimony that both Cheng and Yang were in the gold Toyota at the time of the calls. However, additional evidence showed that Cheng's cell phone was in the possession of Cheng's sister, Eva, at the time of the shootings.

[¶] [Defense objection concerning what Yang's defense counsel argued sustained.] [¶] . . . I think that the evidence shows exactly what this was about in this context, okay. *What questions were asked, and in what order shows more than what, the date of its discovery and how it was used in this trial*, okay. If you think it through, *it's just like those phone records*, okay."

- "Um, I'm going to sit down here. I only have one last thing I want to tell you. Um, the phone records, which were clearly not the case. Remember [*Yang's defense counsel's*] *field day with that*? And the ATM receipt, which was sought to prove one thing and really proved another, didn't it? Okay. *Those kind of made your job harder* but in a way they kind of backfired, all right. This was a very bold crime and they did it in such a fashion that it was almost unsolvable. Their demeanor to the Sheriff's Department and their conduct was very bold, the three-way alibi. All right. And it almost made it unsolvable."
- "In this case this Defendant spoke to someone on the phone and urged that person not to come in here and testify, to go to prison for two years and not give you that piece of information. *When that man can come in this courtroom, through his attorney and represent that he is not the shooter, that is amazing.* You can never overcome that fact, that the one person that he

confessed this shooting to is the one person he tried to dissuade from being here."

Citing these statements by the prosecutor, Pao asserts: "There is a reasonable likelihood that the jury understood the prosecutor's remarks to mean that the defense attorneys had made the juror's service more time consuming and difficult by wasting its time on dramatic presentations that were an unwelcome and improper distraction from the search for the truth, that [Pao's] trial counsel had tried to deceive the jury by subpoenaing and introducing ATM records, and that the attorneys had conspired with their clients to keep Lue Vang [*sic*, read Lue Yang] from showing up in court and disrupting their plan to get an acquittal for their indisputably guilty clients."

We disagree with Pao's assessment of the prosecutor's remarks. Reviewing courts have found remarks more egregious than the prosecutor's remarks in this case "not [to] exceed the bounds of permissible vigor." *(People v. Gionis, supra,* 9 Cal.4th at pp. 1217-1218 ["'[Defense counsel]'s just doing his job'"; "'[h]is job is to . . . get him off'"]; *People v. Breaux* (1991) 1 Cal.4th 281, 305-306 [referring to defense argument, "[i]f you don't have [the law or the facts] on your side, try to create some sort of a confusion"]; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 190 [defense counsel's "job" is to confuse the jury about the issues].) In short, the challenged remarks of the prosecutor in this case were within the "wide latitude [allowed to counsel] in describing the deficiencies in opposing counsel's tactics and factual account." *(People v. Bemore,*

supra, 22 Cal.4th at p. 846.) They did not constitute misconduct.

4. Vouching for Strength of Prosecution Case

The prosecutor argued: "You know there is a lot of evidence here. Um, the sad part is you don't get to compare it to other cases but how frequently do you think it is -- how rare it is to have the man with the perfect motive connected to the car who confessed to his uncle and then calls on the phone and dissuade him? You know, it will never be enough. It will never be enough."

Pao contends that this statement constituted improper vouching. He asserts that the reference to other cases may have led the jurors to believe, based on the prosecutor's experience, that this case was supported by evidence stronger than the evidence presented in other cases. He also claims that it constituted improper vouching for the veracity of Lue Yang's statements inculpating Pao.

A prosecutor is said to vouch for the credibility of a witness when the prosecutor "'"attempt[s] to bolster a witness by reference to facts outside the record."' [Citation.] Thus, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations.] . . . Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record. [Citations.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 206-

207; see also *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1146.)

Concerning the comparison to other cases, the prosecutor's comment did not refer to his own experience. The comment did not imply that the jury should disregard its duty and convict simply because of how the evidence in this case compared to evidence in other cases. The comment was merely an argument that the evidence against Pao was strong because it included his confession to Lue Yang. To the extent that it implied a reference to other cases, it was so vague as to give the jury nothing to rely on with respect to those other cases.

Furthermore, the comment concerning Lue Yang did not constitute vouching. It was a statement based on the evidence in this case, that Lue Yang was related to Pao and that, after confessing to Lue Yang, Pao had attempted to dissuade him from testifying.

5. Acting as Unsworn Witness

The prosecutor argued: "Something that we may not have ever heard made it on the record, right. It's about green and white. Green and white. There are two dialects in Hmong, the green and the white. They are like dialects in English, are they not? We have dialects in English. We have southern, we have northern. Mass media is quickly eliminating them. [¶] There was a point in time when ignorant people, and that is a harsh word to use but it applies, would say things like, that southern drawl means that people are stupid. There is a name for that in America, we call that hate. Okay. That's hate.

That's ugly. [¶] What did he say, Yer Yang? I speak the white, it's clean and pure. They speak green, it's vulgar. That's hate. You see, that motive was so thick and hard that he can never overcome that, no matters [*sic*] what he says. That's the benefit of a long trial. Things like that just squeeze their way out."

Pao contends that this statement constituted improper testimony on the part of the prosecutor because Yer Yang did not say that the white dialect is clean and pure and that the green dialect is vulgar. (*See People v. Hill, supra,* 17 Cal.4th at p. 828 [improper for prosecutor to give unsworn testimony].) This contention is without merit because the prosecutor was characterizing Yer Yang's testimony, not giving testimony of his own.

Yer Yang testified that "green is more like an attitude, you know, like a rough tone, you know, and then the white is like, you know, clearer, you know." The prosecutor's comment was a fair argument that what Yer Yang meant was that the green dialect is more vulgar compared to the clearer white dialect.

D. *Conclusion*

We therefore conclude that, to the extent Pao did not object, his assertions of prosecutorial misconduct are forfeited. We further conclude that his trial counsel was not ineffective for failing to object because the cited comments by the prosecutor did not constitute misconduct.

VI

Evidence of Past Gun Possession (Pao)

Pao contends that the admission of a statement by Bou Vang that she had seen Pao in possession of a firearm two years before the killing violated his due process and fair trial rights. We conclude that, even assuming a constitutional violation, the admission of the evidence was not prejudicial.

In a motion in limine, Pao asked the trial court to exclude, pursuant to Evidence Code section 1101, any mention that Pao's girlfriend, Bou Vang, had seen Pao in possession of a firearm before the events culminating in the killing of Pra. The trial court ordered that no mention of such an event be made during the trial unless the court ordered otherwise. During trial, counsel for Yang played a tape of a police interview of Bou Vang on the day of Pra's killing. In response to a question concerning Pao and firearms, Bou Vang stated during the interview that Pao did not carry a gun but that she had seen him with a gun two years earlier. The trial court concluded that mention of the gun in the interview violated the in limine order; however, the court determined that the evidence was relevant and admissible. The court did not state why it was relevant.

On appeal, Pao asserts that changing the in limine order violated his rights to due process and fair trial. Based on his constitutional argument, Pao argues that we must apply the *Chapman* standard for harmless error, requiring reversal unless the error is harmless beyond a reasonable doubt. (*Chapman* v.

California (1967) 386 U.S. 18 [17 L.Ed.2d 705].) The Attorney General responds that the constitutional issue was forfeited because, in the trial court, Pao did not object to admission of the evidence based on the Constitution. The Attorney General further asserts that it was not error for the trial court to reverse its ruling concerning the evidence, although the Attorney General does not explain why the evidence was relevant. Pao replies to the forfeiture argument by referencing *People v. Partida* (2005) 37 Cal.4th 428, which held that failure to raise a constitutional issue in the trial court does not forfeit the issue if it appears that (1) the appellate claim is the kind that required no trial court action to preserve it or (2) the constitutional argument does not invoke facts or legal standards different from those the trial court was asked to apply. (*Id.* at pp. 435-436.)

We need not consider the merit of Pao's argument that admission of the evidence violated his due process and fair trial rights or the Attorney General's argument that the constitutional issue was forfeited because, even assuming the admission of the evidence concerning Pao's prior possession of a firearm violated Pao's rights to due process and a fair trial, any such error was harmless beyond a reasonable doubt. The evidence of Pao's firearm possession was remote -- two years before the killing -- and was unconnected to the firearm possession in this case and Bou Vang's reference to Pao's prior, one-time possession of a firearm was brief. Furthermore, the evidence of Pao's guilt was overwhelming, supported by his

statement to Lue Yang about his involvement and the eyewitness testimony of Bou Vang that Pao was one of the two assailants. Therefore, there was no prejudice.[8]

VII

Double Jeopardy (Pao)

Pao contends that the trial court violated double jeopardy principles by imposing both 25-years-to-life terms: one for first degree murder and one for the firearm enhancement pursuant to Penal Code section 12022.53, subdivision (d)(1), which provides for an additional 25-years-to-life term when the defendant personally discharges a firearm causing death. He claims that imposing both terms violates double jeopardy because it punishes him twice for causing Pra's death.

Pao recognizes that this contention has been rejected by the California Supreme Court. (*People v. Izaguirre* (2007) 42 Cal.4th 126, 130-131; *People v. Sloan* (2007) 42 Cal.4th 110, 115-123; *People v. Palacios* (2007) 41 Cal.4th 720, 725.) He also recognizes that we are bound by those decisions. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we conclude the double jeopardy contention is without merit.

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[8] Given this conclusion, we also need not consider Pao's assertion that, if a more specific objection was necessary to preserve the constitutional issue, his trial counsel was ineffective for failing to make the objection.

DISPOSITION

The judgments are affirmed.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

BUTZ, J.